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Supreme Court, U.S.
FILED
AUG 30 1991
OFFICE OF THE CLERK

No. 91-101

In the
Supreme Court of the United States
October Term, 1991

UNIVERSAL FOODS CORPORATION,

Petitioner,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION and BARBARA DAMATO,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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RESPONDENT DAMATO'S MEMORANDUM IN OPPOSITION

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August 30, 1991

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QUESTION PRESENTED

Does section 301 of the Labor-Management Relations Act preempt a state administrative agency from holding that an employer improperly refused to re-employ a worker following recuperation from her on-the-job injury, and from deciding, without interpreting or applying a collective bargaining agreement, that the employer's invocation of that agreement was merely a pretext ?

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STATEMENT

Beginning in !983, respondent Barbara Damato was employed as a packing machine operator by petitioner Universal Foods Corporation.[1] On November 15, 1984, she suffered work-related carpal tunnel syndrome in her left wrist and obtained workers compensation benefits for the injury and her resulting disability. Simultaneous with respondent's injury, petitioner initiated a layoff of employees, and selected the employees to be laid off by seniority, as required by the collective bargaining agreement

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[1]. This memorandum refers to the respondent Damato as "respondent," and to respondent Wisconsin Labor and Industry Review Commission as "the Commission."

("CBA") between petitioner and a brewery workers local union. Respondent was one of the employees included in the layoff, the propriety of which is not contested.

According to her testimony, which was credited by the Commission, less than a year after her injury and layoff, in October 1985, respondent received a telephone call from her former supervisor, Bernie Fredrick, who advised her that a job was available and asked whether she was able to return. Respondent indicated that she wished to consult with her doctor first, and, after the doctor told her she should try the job, she called back to accept the offer of reemployment. Petitioner's agent Fredrick then told her that she was not needed.

On February 9, 1988, respondent complained to the Commission that petitioner had violated the Wisconsin workers compensation laws Wis. Star. § 102.35, which forbids discrimination against workers compensation claimants. Subsection 3 requires employers to rehire employees who are injured in the course of their employment, when suitable employment is available within the employee's abilities. Petitioner defended on the grounds her seniority had expired an November 15, 1985, citing the CBA, which provides that employees of less than five years would lose their seniority rights when they had been laid off for more than one year, and pointing to a proviso of section 102.35(3), which provides that the seniority provisions of any CBA would govern determinations of the availability of suitable employment. In support of this contention, petitioner offered the testimony of a

manager to the effect that two employees with more seniority than Damato, who had also been laid off on November 15, 1984 had similarly lost their seniority on november 15, 1985.

An administrative law judge upheld this defense, Appendix to the Petition for a Writ of Certiorari ("Pet. App.") A66-A71, but the commission reversed. Id. A53-A65. It held that Fredrick's telephone call established thet there were jobs available for respondent within the year following her injury, Id. A56-A57, and that petitioner had acted inproperly in refusing to make this job available to Damato simply because she had insisted upon checking with her doctor before accepting the offer. If. A57-A58. Petitioner's reliance on respondent's seniority, and on the seniority provisions of the CBA, was firmly rejected: "The Commission majority finds this reason pretextual. " Id. A58. The majority further rejected petitioner's assertion that there was no "suitable" employment available on the ground that petitioner had failed to carry its burden of proof on that question at the hearing. Id. A59-A60. Accordingly, respondent was awarded one year of back, the statutory maximum. Id. A62. One commissioner dissented, arguing Fredrick had never really offered respondent a position and that petitoner's refusal to offer her a job after contractual recall rights expired was not unreasonable. Id A63-A65.

Petitioner then sought review of the agency's decision in Wisconsin Circuit Court, which upheld the back pay award. Id. A35-A52. According to the court, respondent established a primea facie case by showing that she was an employee at the time of injury,

that she suffered a compensable injury, that she was able to return to work, and that, based on her testimony about the telephone call from Fredrick, petitioner had unreasonably refused to hire her. Id. A42-A43. Thus, the court ruled, the burden shifted to petitioner to show reasonable cause for not hiring her. Although petitioner argued that Fredrick was really just checking on Damato, not offering her a job, and that its own witness has shown that no jobs were available, the court held that was really a factual question -- was there a job available for respondent in October, 1985 ? Id. A43-A44. That factual question, the court decided, had been resolved by the Commission in weighing the credibility of the two opposing witnesses, and questions of credibility, weight of testimony, and the inferences to be drawn from testimony may not be reweighed by the courts, so long as there was substantial evidence to support the decision. Id. A44-A45. Moreover, the court rejected petitioner's preemption argument, noting that, because the Commission had accepted respondent's testimony about the October, 1985 telephone call, it had not been necessary to interpret the CBA. Id. A47-A48

Petitioner appealed to the Wisconsin Court of Appeals, relying both on the contention that there was insufficient evidence to sustain the decision, and on the claim that the application of the state law to Damato's case was preempted because the Commission was "required to interpret[the CBA] in this case." Petitioner's Court of Appeals Brief, page 1. In the portion of its brief that addressed the preemption question, petitioner presented a long list

of contractual issues which, petitioner contended, had to be resolved before the Commission would decide whether a job was available to be offered to respondent. Id. 10-11. Thus, petitioner argued, even if one of its supervisors did offer respondent a job, the offer might have been contrary to the contract, and thus not required by state law; accordingly, petitioner hypothesized, only by construing the contract could the Commission decide whether state law had been violated. d. 11-13.

In the portion of its brief that addresses the state law questions, however, petitioner acknowledged that the agency had found, solely on credibility grounds, that it had retaliated against Damato exercising her rights under the workers compensation scheme, and its argument against that finding did not mention the CBA at all. Id. 14-17.

The court of appeals affirmed. Pet. App. A10-A23. It agreed with the circuit court that, on the facts of this case, there had been no need to interpret the CBA in order to decide that petitioner had a job available in October 1985 and that Damato had been denied this jib. Id. A16. One judge dissented on the ground that the one-year employment period had itself been derived from the CBA, and that this reference to the CBA, even though it was derived from petitioner's own arguments and even though it was wholly undisputed, was sufficient to preempt the state agency's application of state law. Id. A27. Petitioner then sought discretionary review in the Wisconsin Supreme Court, which denied review without comment. Id. A1-A2.

REASONS FOR DENYING THE WRIT

The Question of Whether Section 301 Preempts Some Claims Under the Wisconsin Workers Compensation Retaliation Statute Is Not squarely Presented Here, Because the Courts Below Found It Unnecessary to Consider the Meaning of the CBA on the Facts of This Case.

1. In the trial and intermediated appellate courts, petitioner focused its preemption claims on the facts of this case, as petitioner asserted them to be, contending that the propriety of its treatment of Damato herself could not be evaluated without deciding a number of questions under the contract. In its petitions for discretionary review in the Wisconsin Supreme Court and for Certiorari in this Court, however, the questions presented no longer depend on the need to interpret the CBA in order to decide this case. Petitioner has subtly shifted ground, mounting what is essentially a facial attack on the statute requiring the re-employment of workers who suffer on-the-job injury, based on the statute's explicit recognition of the fact that a CBA may often speak to the question of whether a job is "available" for the injured worker. The reason for this change is evident: both the agency and the lower courts decided that, whatever the CBA may actually mean, the CBA was invoked here as a pretext for depriving respondent of employment, and so petitioner's violation of state law does not depend on the meaning of the CBA.

Thus, in its briefs below, petitioner expressly recognized that the agency and trial court had decided that the question of whether petitioner had discriminated against respondent

turned on determinations of the credibility of the two witnesses who testified at the agency hearing, and on the drawing of an inference from the telephone call from respondent's supervisor that, whatever the contract may have provided, petitioner had a job available for respondent which it refused to give her once she insisted upon checking with her doctor. Petitioner objected strenuously to the proposition that the case could be decided on such grounds, instead of looking to the CBA, but the state courts rejected that argument and rested squarely on the pretext finding, which, they decided as a matter of state law that is, of course, unreviewable here, obviated the need to look at the CBA.

Nor is there any conflict between the decisions below and the First Circuit's decision in Magerer v. John Sexton & Co., 912 F. 2d 525 (1st Cir. 1990). The claim in that case was under a statute which, as construed by the court, provided that it was the CBA, not the statute, that provided the standard for deciding whether the employer's conduct was retaliatory or discriminatory. Id. at 529. In those circumstances, the state anti-discrimination law was simply a means for enforcing the CBA itself, and so suit under the statute was preempted by section 301. Here, by contrast, not only is the state law independent of the contract, but on the facts of the case, it was unnecessary for the courts below to decide whether that CBA was violated, and so the reasoning in Magerer is not at all inconsistent with the decision below.

2. In Lingle v. Norge, 486 U.S. 399 (1988), this Court held that a workers compensation retaliatory discharge cause of

action may be decided without interpreting the CBA, and that, Accordingly, lawsuits for retaliatory discharge were not preempted by section 301 of the LMRA. Following Lingle, the lower federal courts have generally held that an employer's mere assertion, in defense of a state law retaliation case, that it acted consistently with the CBA, is not sufficient to preempt the state law claim. After all, if mere assertion of a contract defense were enough to warrant preemption, then all discrimination cases would be preempted, and Lingle itself would be a dead letter. However, the ultimate question in such cases is one of fact -- was the employer's motive one of discrimination against the injured worker, or did the employer have some other motive -- and that question may normally be decided without construing the CBA. Miller v. AT&T Network Sys., 850 F. 2d 561, 569-550 (9th Cir 1988) ; Simplex v. Chrysler Corp., 879 F. 2d 1326 (6th Cir 1989) (en banc); Bettis v. Oscar Meyer Foods Corp. 878 F. 2d 192, 197 (7th Cir 1989). See Also Banks v. General Motors Corp., 904 F. 2d 344 (6th Cir 1990)

There may be a question lurking in some such cases, concerning the proper way in which to handle contract questions that do arise, when the court is unable to avoid considering them by finding that they have been raised as a pretext, as happened here. The Court indicated in Lingle that section 301 might govern the judicial resolution of the contractual questions without necessarily preempting the remainder of the case. 486 U.S. at 413 n.12. The lower courts have barely begun to address the significance of footnote 12, and this Court may ultimately have to

decide, in an appropriate case, how the resolution of those questions is to be accomplished. But that issue is not presented here, where the agency found it unnecessary to decide any questions of CBA interpretation.

Petitioner seizes on the reference by the courts below to the one-year reemployment period to establish that they relied on the CBA in order to decide this case. In fact, however, it was petitioner that introduced the argument about the one-year period into the case, in an attempt to show that its failure to re-employ Gameto after the passage of one year following the November 15, 1984 layoff was justified and not discriminatory. The Commission noted that argument, but found that one of petitioner's agents told respondent that petitioner had a job for her within that one year period, thus undercutting petitioner's defense. In order to reject petitioner's defense, it was unnecessary for the Commission to decide any questions of contractual interpretation -- indeed, there was no dispute before the Commission or in the lower courts about the existence or significance of the one-year rule -- and so the rejection of petitioner's defense did not depend on the CBA, and there was no basis for preempting the state's regulation.[2]

3. There is another reason why petitioner errs by invoking the line of cases including Allis-Chalmers Corp. v. Lueck,

[2] The petition also states that the Commission's determination of respondent's ability to perform certain jobs was based on a contract clause, Pet at 21. To the contrary, this is a factual question that is decided by comparing actual jobs to actual medical restrictions, and not by construing a CBA, and the portion of the decision cited in the petition makes no reference to the CBA. See Pet.App. A59-A60

471 U.S.202 (1985) and Lingle v. Norge, supra, to show conflicting analyses that warrant review here: unlike all of those cases, this case involves the action of a state regulatory agency, and not a lawsuit in state or federal court. Petitioner does not cited any cases applying the peremption analysis of Lingle v. Norge to state agency proceedings, and we are not aware of any.

This Court has long recognized that the principles governing the enforcement of CBA's under section 302 of the LMRA do not preempt the National Labor Relations Board from deciding issues of contractual interpretation when necessary to resolve an unfair labor practice case. NLRB v. Strong 393 U.S. 357, 360-361 (1969). Similarly, even if a state agency needed to construe a CBA, that would not necessarily mean that the state agency needed to construe a CBA, that would not necessarily mean that the state agency's authority was preempted by federal law. In the absence of any conflict among the lower courts concerning the applicability of section 301 preemption in such cases, there is no basis for this Court to grant review in this case to address that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO PROCEED IN FORMA PAUPERIS and MEMORANDUM IN OPPOSITION was mailed this 31ST day of August ,1991 to:

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